

1 the record and by the proper analysis. As the magistrate judge found, “[w]hile juries must receive
2 instruction on lesser included offenses in capital cases . . . the failure of a state trial court to
3 instruct sua sponte on lesser included offenses in a non-capital case does not present a federal
4 constitutional question.” *Burgess v. Galaza*, 211 F.3d 1272 (9th Cir. 2000) (internal citations,
5 marks and emphasis omitted).

6 The court has also considered whether to issue a certificate of appealability under Rule
7 11(a) of the Federal Rules Governing Section 2254 Cases. Before petitioner can appeal this
8 decision, a certificate of appealability must issue. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).
9 Where the petition is denied on the merits, a certificate of appealability may issue under
10 28 U.S.C. § 2253 “only if the applicant has made a substantial showing of the denial of a
11 constitutional right.” 28 U.S.C. § 2253(c)(2). The court must either issue a certificate of
12 appealability indicating which issues satisfy the required showing or must state the reasons why
13 such a certificate should not issue. *See* Fed. R. App. P. 22(b). Where the petition is dismissed on
14 procedural grounds, a certificate of appealability should issue if the prisoner can show “jurists of
15 reason would find it debatable whether the petition states a valid claim of the denial of a
16 constitutional right and that jurists of reason would find it debatable whether the district court was
17 correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). For the reasons
18 set forth in the magistrate judge’s findings and recommendations, the court finds that issuance of
19 a certificate of appealability is not warranted in this case.

20 Accordingly, IT IS HEREBY ORDERED:

- 21 1. The findings and recommendations filed September 12, 2022, are adopted in full;
- 22 2. Petitioner’s first amended petition for a writ of habeas corpus, ECF No. 10, is
denied;
- 23 3. The court declines to issue a certificate of appealability;
- 24 4. Petitioner’s motion, ECF No. 18, for a new trial is denied; and
- 25 5. The Clerk of the Court is directed to enter judgment and close this file.

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27 DATED: January 24, 2023.
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CHIEF UNITED STATES DISTRICT JUDGE